

**FLAG-BURNING,
DISCRIMINATION,
AND THE
RIGHT TO DO WRONG**

Two Debates

Resolved:

A Flag-Burning Statute Is Unconstitutional, and
a Flag-Burning Amendment Is Un-American

Resolved:

The Civil Rights Act of 1990
Is a Threat to Our Civil Rights

edited by
Roger Pilon

Cato Institute Center for Constitutional Studies

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Morton H. Halperin
American Civil Liberties Union

v.

Paul D. Kamenar
Washington Legal Foundation

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of 1990
Is a Threat to Our
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Richard A. Epstein
University of Chicago

v.

Antonio J. Califa
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Introduction

Roger Pilon
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Two questions that captured the attention of the American public in the spring of 1990 were whether we should ban the burning of the American flag and whether we should enact a new civil rights statute to broaden the rights of minorities, women, and others in the workplace. Those are distinct questions, to be sure, and have been seen as distinct by most of the public. Nevertheless, underlying them are certain common themes that go to the core of the American vision.

To illuminate those questions and themes during this period, the Cato Institute's Center for Constitutional Studies sponsored two debates. On May 11, 1990, three days before the Supreme Court heard arguments in the latest round of flag-burning cases, the center invited Morton H. Halperin, director of the Washington office of the American Civil Liberties Union, to debate Paul D. Kamenar, executive director of the Washington Legal Foundation, on the proposition, "A Flag-Burning Statute Is Unconstitutional, and a Flag-Burning Amendment Is Un-American." Then on June 7, 1990, as congressional committees were taking up a bill called the Civil Rights Act of 1990, the center invited Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law at the University of Chicago, to debate Antonio J. Califa, legislative counsel for the Washington office of the American Civil Liberties Union, on the proposition, "The Civil Rights Act of 1990 Is a Threat to Our Civil Rights."

Although the flag-burning issue would seem to be moot at this writing—on June 11, 1990, the Supreme Court found the 1989 Flag Protection Act unconstitutional, and Congress has since failed to

propose a constitutional amendment that would enable states to ban flag-burning—a number of politicians have promised that the issue will be with us at least through the fall election campaigns. Whatever the fate of the Civil Rights Act of 1990, the issues it touches will also be with us for some time to come. Accordingly, to encourage broader discussion of the two questions, and to shed light on the underlying issues that join them, the Center for Constitutional Studies is pleased to publish here the edited transcripts of the debates.

When the Supreme Court found for the second time in as many years that a statute aimed at prohibiting the desecration of the American flag as a form of political protest was itself prohibited by the First Amendment to the Constitution, the Court did so by drawing upon the classic distinction between speech and its content. The statute's "restriction on expression cannot be justified without reference to the content of the regulated speech," the Court said. And "if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

This distinction between speech and its content is ancient, of course, finding its roots in antiquity, its modern expressions in the *philosophes* of the Enlightenment and the Founders of the American Republic. When Sir Winston Churchill observed in 1945 that "the United States is a land of free speech. Nowhere is speech freer—not even [in England] where we sedulously cultivate it even in its most repulsive forms," he was merely echoing thoughts attributed to Voltaire, that he may disapprove of what you say but would defend to the death your right to say it, and the ironic question of Benjamin Franklin: "Abuses of the freedom of speech ought to be repressed; but to whom are we to commit the power of doing it?" There is all the difference in the world between defending the right to speak and defending the speech that flows from the exercise of that right. Indeed, with perfect consistency one can condemn the burning of the flag, as most Americans do, while defending the right to burn it.

Yet for many—Americans and non-Americans alike—the distinction between speech and its content is difficult to grasp, and certainly difficult to endure. Some see the relatively explicit protections

of the First Amendment as an impediment to some "right of the majority" to express its values through the democratic process. Others draw a distinction between speech and action, then claim that the First Amendment protects only the former—apparently unaware not only that speech takes many forms, many quite "active," but that all speech is action and, arguably, all action is, if not speech, at least expression. Still others point to such restrictions on speech as are found in the areas of endangerment (shouting "Fire!" in a crowded theater), defamation, and obscenity, assume those to reflect mere value or policy decisions, then ask why restrictions on flag desecration should be treated any differently.

Setting aside restrictions on obscenity as they pertain to adults, which are inexplicable anomalies in the jurisprudence of the First Amendment, the rationale for restricting speech that endangers or defames others is both persuasive and instructive. Indeed, when properly explicated, that rationale goes to the core of the American vision, as captured most generally in the Ninth Amendment, of which the First Amendment, among others, is simply a more specific manifestation. Stating that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," the Ninth Amendment is fairly read as recognizing and establishing in law a general presumption in favor of liberty. Whether we call that presumption a "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," as Justice Brandeis put it when exploring the idea of privacy, or a right to be free, a right to come and go as we please, to plan and live our own lives, that basic right is limited only by the equal right of others and by the express powers of government that are enumerated in the Constitution and in the constitutions of the various states. It is precisely because they implicate the rights of others, therefore, that acts that endanger or defame are not protected by the First Amendment, even when they are deemed to be "speech," whereas acts that do not implicate the rights of others are protected.

It is this fundamental principle, then, the principle of equal freedom, defined classically by our rights to life, liberty, and property, that constitutes the core of the American vision and serves as well to order systematically the countless examples of those rights—from speech to religion, contract, due process, and on and on. Far

from being mere value or policy choices, when rationally related, those rights reflect a moral order that transcends our contingent values and preferences. That transcendent order—the higher or natural law, if you will—was captured most forcefully in our Declaration of Independence, of course, which states plainly that we are born free and equal, with equal moral rights to plan and live our own lives—even, by implication, when doing so offends others. Call it tolerance, call it respect: it is the mark of a free society that individuals are left free to pursue their own values, however wise or foolish, however enlightened or benighted, however pleasing or offensive to others.

But if that fundamental principle applies not simply to flag-burning, nor even simply to speech, religion, and other First Amendment issues generally, but across the board—to all questions about the relationship between the individual and his government—then we cannot shirk from that application, however unpleasant or unpopular the results may be. We turn, then, to the second of our debates and to the question whether the Civil Rights Act of 1990 is a threat to our civil rights. Plainly, underlying that question is the more basic question about just what our civil rights are. It is that more basic question to which Professor Epstein points when he challenges not simply the proposed Civil Rights Act of 1990 but the assumptions underlying the Civil Rights Act of 1964 as well. In the Washington of 1990, neither of those challenges, but especially the latter, will earn one popular acclaim. If we are serious about getting to the heart of the matter, however, and about understanding the core of the American vision, the fundamental questions must be examined.

Now it would be one thing to respond to the basic question about what our civil rights are by answering that those rights are what the legislature says they are. That tack is all too familiar. In so responding, however, not only would we place our rights at the mercy of majorities—or, if the public choice school of thought is correct, at the mercy of special interests—but by doing so we would expose those rights to the vagaries of popular opinion, which is precisely what we have rights to protect us from. If our rights come and go according to the winds of political fashion, then we live not under the rule of law but under the rule of men. Indeed, it was precisely to secure the former that our Founders wrote a constitution in the first place, a constitution, as noted above, that was

founded on the principle of equal freedom, as defined by our rights to life, liberty, and property. Subject those rights to the vagaries of public opinion and you undermine the very foundations of that moral and legal order.

Yet that is precisely what has happened over a wide area of life, including the especially wide area that is defined by our rights, or freedom, of association. As Professor Epstein observes, the civil rights acts that were enacted after the Civil War were intended simply to ensure that freed slaves would have the same civil capacities, or rights, as other free persons—rights to purchase and hold property, to make and enforce contracts, to sue and be sued, and so on. That those newly recognized rights came to be frustrated, especially in the South, by Jim Crow is appalling, of course, for the Jim Crow restraints were in direct violation of the American vision that the civil rights acts were intended to secure. And insofar as the Civil Rights Act of 1964 eliminated Jim Crow, it is to be commended. But the idea behind the early civil rights acts was to give force at last to the principle of equal freedom upon which this nation was founded, however imperfect that founding. The idea was not, most decidedly, to recognize “rights” that were inconsistent with that principle.

With the Civil Rights Act of 1964, however, that precisely is what took place. Driven by the very real problem of discrimination, but failing utterly to distinguish between the appalling institution of public discrimination, in the form of Jim Crow, and its private counterpart, the authors of the 1964 act created a “right” against private discrimination on certain grounds and in certain contexts, which has been expanded over the years. That “right,” of course, is nowhere to be found in the Constitution or in its underlying principles. Indeed, its enforcement is inconsistent with that document and with those principles. For if we do have a right to be free, to plan and live our own lives as we choose, limited only by the equal right of others, then we have a right to associate, or to refuse to associate, for whatever reasons we choose, or for no reason at all. That is what freedom is all about. Others may condemn our reasons—that too is a right. But if freedom and personal sovereignty mean anything, they mean the right to make those kinds of decisions for ourselves, even when they offend others.

None of this is to defend private discrimination, of course. Rather, as in the case of flag-burning, it is to defend the *right* to

discriminate. For discrimination, like flag-burning, violates no rights of others, however offensive it may otherwise be. We have no more right to associate with those who do not want to associate with us, for whatever reason, than we have to be free from the offense that flag-burning gives. Fortunately, most Americans condemn both flag-burning and discrimination. But in doing so they make value judgments, which are very different from rational judgments about the rights we have. Indeed, the whole point of rights is to enable us to pursue our ends, especially our unpopular ends. We hardly need to invoke rights to pursue popular ends.

Enter, however, this "right against discrimination" and the issues are turned on their heads. Now we may no longer choose not to associate with someone for the proscribed reasons; indeed, we have an obligation not to discriminate on those grounds. But how do we enforce such a right? After all, those who are otherwise inclined to discriminate on one or more of the proscribed grounds are not likely to announce their reasons, thereby subjecting themselves to the sanctions of the act. The answer is that, save for those rare cases in which someone openly defies the act, we have to abandon an intent test, for all practical purposes, and look instead at the effects of an individual's actions. If an employer has a workforce in which blacks or women, say, are "underrepresented" with respect to the "relevant population," we presume, *prima facie*, that he has discriminated on those proscribed grounds (race and sex) and then ask him to prove that he has not. Thus does the burden shift—from the state to prove guilt to the defendant to prove his innocence—not because the statute explicitly requires it—far from it—but because *practically* that is the only way such a "right" can be enforced. For given such a statute, and the sanctions it imposes, people simply do not go around saying they discriminated for one of the wrong reasons. By the same token, however, people who discriminate for *other* reasons, and get their numbers wrong, will be swept into the maw of this statute, from which they will extricate themselves only if they are able to convince the court that those reasons are compelling.

Quotas, then, are no explicit part of the 1964 act, nor are they of the proposed 1990 act. But they are there all the same, every bit as real as if they were written in stone. For if an employer does not get his numbers right, the burden of proving his innocence is so

onerous, and the penalties for failing to do so, especially under the 1990 act, so draconian, that for all practical purposes he will operate as if quotas were explicitly in the statute. Thus those who oppose quotas, but believe in this "right against discrimination," need to rethink their position. If they are serious about enforcing such a "right," then de facto quotas are inescapable.

We return, then, to the underlying issues that join these two debates. For at a deeper level, the approach we have taken to the problem of private discrimination—admittedly, a very real problem that cries out for condemnation—is itself an affront to our founding principles. We speak, after all, of the indivisibility of freedom. And we understand that idea and its applications, for the most part, in such areas of the Constitution as the First Amendment, where our rights are relatively clear. But the principle of those First Amendment rights—that individuals are and ought to be free to express their own values and live their own lives, however much they may offend others in the process—is perfectly general. Again, most Americans find flag-burning abhorrent, just as they find discrimination abhorrent. As long, however, as those who burn flags or those who discriminate do not violate the rights of others, their right to so behave should be protected.

Indeed, we have other, more peaceful and, ultimately, more effective means of dealing with such people. In the age of communication—local, national, and global—the force of moral suasion and public obloquy in areas such as these is far more effective and far less costly than any heavy-handed resort to law, with all its unintended consequences. We need to unleash this force, not disparage it by a too hasty, and ultimately misguided, resort to legal force. And we need in particular to be careful about compromising our fundamental, founding principles, not only when our ends are noble, but especially when they are noble.

Resolved: A Flag-Burning Statute Is Unconstitutional, and a Flag-Burning Amendment Is Un-American

Arguing Pro: *Morton H. Halperin*
American Civil Liberties Union

Arguing Con: *Paul D. Kamenar*
Washington Legal Foundation

Introduction: *Roger Pilon*
Cato Institute

Roger Pilon: We are gathered today because one Gregory Lee Johnson, during the course of the 1984 Republican national convention, took it upon himself to unfurl an American flag in front of the Dallas, Texas, city hall, douse the flag with kerosene, and then set it on fire—all as part of a political demonstration to protest the policies of the Reagan administration.

Johnson was subsequently convicted of desecrating a venerated object in violation of a Texas statute that made it a crime to desecrate an American flag in a way that the defendant knows "will seriously offend others." Although Johnson's conviction was later reversed by the Texas Court of Criminal Appeals, the case made its way to the United States Supreme Court, which in June of last year, by a 5 to 4 vote, affirmed the appellate court's reversal, declaring the Texas statute to be in violation of the First Amendment's guarantee of freedom of expression.

Writing for the Court, Justice Brennan concluded his opinion with what he termed "a regrettably patronizing civics lecture" addressed "to the members of both houses of congress," among others: "The way to preserve the flag's special role is not to punish those who feel differently about these matters [but] to persuade them that they are wrong."

Notwithstanding Justice Brennan's admonition, the Congress of the United States thereupon passed, and President Bush signed, the 1989 Flag Protection Act, which was immediately challenged by one Mr. Haggerty, in the State of Washington, and one Ms. Eichman, who with two others was prosecuted for burning an American flag on the steps of the U.S. Capitol. Given the Supreme Court's decision in *Texas v. Johnson* (1989), the prosecution in both cases failed, whereupon the cases were immediately appealed to the Supreme Court of the United States, as provided for in the statute, where they will be argued next Monday at 10:00 a.m. If the United States loses its appeals in those cases, it is widely believed that the Congress may propose an amendment to the Constitution that would make it a crime to desecrate an American flag, which would amount to an amendment to the First Amendment.

Our debate today, therefore, will address not only the question of a flag-burning statute but the question of a flag-burning amendment as well. Our proposition is: "A Flag-Burning Statute Is Unconstitutional, and a Flag-Burning Amendment Is Un-American."

Arguing in the affirmative is Mr. Morton H. Halperin, director of the Washington office of the American Civil Liberties Union. A graduate of Columbia College, Mr. Halperin received his doctorate from Yale University. After teaching at Harvard University, he served in the Johnson administration as deputy assistant secretary of defense for international security affairs and as a senior staff member of the National Security Council with responsibility for national security planning. A prolific writer, Mr. Halperin is responsible at present for the national legislative program of the ACLU as well as the activities of the ACLU Foundation based in the Washington office.

Arguing in the negative is Mr. Paul D. Kamenar, executive legal director of the Washington Legal Foundation, a nonprofit public interest law and policy center that engages in litigation on a broad range of issues. Mr. Kamenar is a graduate of Rutgers College, where he received a B.A. in economics, and the Georgetown University Law Center, where he has also taught. He was a clerk for the Senate Watergate Committee, U.S. Attorney's office for the District of Columbia, and served as well in the general counsel's office of the Federal Election Commission. Also a prolific writer, since 1980 Mr. Kamenar has been director of litigation for the Washington Legal Foundation.

Mr. Halperin, why is a flag-burning statute unconstitutional and a flag-burning amendment un-American?

Morton H. Halperin: I was tempted to stand up today and say that if you do not understand why the federal statute banning the desecration of the flag is unconstitutional and why a constitutional amendment to that effect would be un-American, there is really nothing that I can say to explain it to you. But under the theory that nobody is permanently beyond redemption, let me try. It is certainly the case that the outer limits of the First Amendment are subject to debate. We have had cases about begging in the subways, about topless dancing, about commercial speech. But there can be no doubt that at the core of the First Amendment is the right of political expression—the right to make your political views known—and that right extends not only to speech but to *all* forms of political expression.

I doubt that anybody would deny, at least at this point, that the First Amendment protects not only speech but other forms of expression and that political expression is the core of what is protected. Nor can anybody doubt that those who burn the flag are sending a political message. And if that is the case, I have to ask, how can one possibly think that the state can put people in prison for expressing their political views?

In the Supreme Court briefs, there are two arguments for the constitutionality of anti-flag-burning statutes. One is that flag-burning fits under the "time, place, and manner" exceptions to the First Amendment, and the second is that the flag is unique.

For the state to prevail with the time, place, and manner argument, there not only has to be a time, place, or manner regulation—which I doubt the anti-flag-burning statutes are—but second, and most important, there has to be a compelling state interest that is advanced by the regulation and that is unrelated to the state's dislike of the content of the political message. It is absolutely clear that dislike of flag-burning on the part of Congress and the Texas or any other legislature has to do with the symbolism of the flag and with the message being expressed by those who burn it. There is just, I think, no way to get around that.

There is no way to articulate, and nobody has articulated, a state interest here that does not have to do with expressing views about

political issues. There is no concern about safety, about health, about intruding into the private space of other people, about enforcement of a government regulatory scheme. Some may point out that the courts have permitted the states to regulate what may be put into mailboxes and prohibit the burning of draft cards. I think those cases were wrongly decided, but they were clearly different because they had to do with the states' need to enforce regulatory schemes. Therefore the argument really comes down to what, in all honesty, proponents of anti-flag-burning legislation or an amendment really believe—the flag is an exception to the First Amendment because there is something inherently different about it.

The other exceptions to the First Amendment that the Supreme Court has created—obscenity, fighting words, and so on—all require making a judgment (which again I disagree with) that no content is being expressed. That has to be the finding because obscenity that has a political purpose is protected. Therefore all the previously created exceptions have involved the Court's saying that certain types of expression are not protected by the First Amendment. But in the case of flag-burning we are dealing with core expression, and it is not possible to make such a finding. Therefore the argument comes down to this: if a form of political expression is repugnant enough to a large enough percentage of the American population, they have the right to say that you cannot express your views in that way.

In other words, what the proponents of the statute and the amendment are saying is that I can express my political views any way I want to, with whatever intensity and symbolism I want to, as long as I don't offend some magic percentage of the American population enough to cause them to say that they do not want to tolerate and therefore will not tolerate my particular form of political expression. To be constitutionally protected, speech must be political, but it must not outrage large numbers of people.

Now, if that is not the principle, then I would ask what would distinguish a flag-burning constitutional amendment from, say, an amendment that says that you cannot destroy a Torah. There is a significant segment of Americans—Orthodox Jews—who believe that burning even your own Torah is a terrible act that should be prohibited. If they were in the majority in this country, they would want to prohibit Torah-burning. Their intensity of feeling, I assure

you, is as great as that of those who do not like to see flags burned. The only difference is that they are not a majority of the population of this country. What about cross-burning? What about Nazis goose-stepping in uniform and shouting "Heil Hitler"? Can one really say to survivors of the Holocaust that a Nazi salute is less repugnant than the burning of a flag? I would be very offended were somebody to burn the Bill of Rights. But should our constitutional standard be outrage? Should I have merely to move enough of you to anger to legitimize amending the Constitution to ban desecration of a copy of the Bill of Rights or the flag?

I would say that if there is anything that can properly be called un-American, and I think one should be very careful about that term, it is precisely the notion that under our system of freedom of expression, if enough of us do not like the way you express your political views, we can stop you. If the idea of freedom of expression in this country means anything, it means exactly the opposite. The fact that somebody else is outraged by your form of expression does not restrict your right to communicate your meaning, and you must be protected in that right. In this case as in all other cases of speech that someone does not like, the remedy is not suppression of that speech but more speech, speech criticizing the offensive speech. Anything else, in my view, is dangerous to our liberty and, yes, un-American.

Paul D. Kamenar: A year ago, a few days before the Supreme Court ruled that burning the American flag was constitutional, a World War II Navy veteran in New Mexico was found guilty of violating a town anti-noise ordinance because his American flag flapped too loudly. He went to the ACLU, who refused to represent him. I flew down there and got the conviction overturned. I am sorry that the ACLU was not there representing the man who wanted to fly that flag—and I was unhappy to learn that when one of your members presented your national office with a flag, which you did not have, it was rejected because there was already enough decoration in the office. I find it a little ironic that the American Civil Liberties Union does not have an American flag.

With the Supreme Court ruling that flag-burning is constitutional and a New Mexico court initially ruling that flying a flag is illegal, we can see that our courts have gone astray over the last 20 or so

years. Let me put the First Amendment in perspective. The First Amendment is obviously one of the most important, if not the most important, amendments to our Constitution. But it is not absolute. To quote from *New York v. Ferber* (1982): "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words, those which by their very utterance inflict injury or tend to incite an imminent breach of the peace." I guess that since the recent decision by the Second Circuit we could add that panhandling is not protected by the First Amendment, unless of course you are burning an American flag while you are panhandling.

To me, burning the American flag is not really speech, it is conduct. It is violent conduct; indeed it is inflammatory conduct, both literally and figuratively. Restrictions on that kind of conduct are not directed at what a person believes or is trying to express. Rather, as Justice Stevens said in his dissenting opinion in *Texas v. Johnson*, the law is content neutral. It punishes everyone for desecrating the flag, regardless of the desecrater's message.

The Court, in my opinion, confused the communicative impact of outrageous conduct with the impact of the political message conveyed by that conduct. I dare say that the public is not particularly upset that Gregory Johnson hates the American government's policies. What they are upset about is the fact that he vilely destroyed a symbol that is revered by almost all the American people as our symbol of national unity. The visual and emotional assault was no less disturbing than the aural assault of sound trucks going through a residential neighborhood at 3:00 a.m., regardless of the message they are playing. In fact, Justice Stevens posited a hypothetical of someone who did not intend to convey any political message or who wanted to convey an opposite message. For example, a patriotic veteran who is upset that people are blasé about patriotism and burns an American flag just to arouse their anger would also be prosecuted under the statute.

Morton describes burning the American flag as core First Amendment speech. But it is not core speech as such speech has been traditionally understood; it does not express ideas about how our

government is to run. That is the core speech that the First Amendment is all about. Flag-burning, if it can be called speech at all, is at the outer fringes of what one would normally think of as speech.

But let us assume that such symbolic speech is somehow core speech. What are to be the limits on prohibition of offensive conduct? Keep in mind that the Texas law also made it illegal to desecrate a place of worship or burial. If Johnson's act of vandalism was expressive conduct, then I guess a satanic cult that desecrated grave sites to make a statement about traditional religious burial customs would also be protected from prosecution. Many jurisdictions make it a crime to desecrate a place of worship. Thus vandals who spray-painted a synagogue, not knowing what it really was, could be charged with simple vandalism. However, if they knew what the building was and spray-painted the letters "KKK" or a swastika on it, they might be subject to harsher penalties. The community has the right to declare that kind of desecration deserving of special, enhanced punishment. Yet, according to Morton, if desecrators of a synagogue wanted to make a political statement against Jews, the anti-desecration laws would be unconstitutional.

Where does it stop? Society has laws against public nudity and public sex acts. Someone could say, "I am making a statement by engaging in sex acts in public because I want to show my displeasure with society's mores." Are those acts protected? Are they core, symbolic speech? I would argue that flag-burning, like sex acts, really is not speech, or if it is, that it can be a prohibited category like libel, profanity, and fighting words.

A related issue is the breach-of-the-peace argument. Precisely because desecration of the flag offends many Americans, the state has an interest in averting any breach of the peace that might be triggered by such offensive and destructive conduct. Again, the people are not upset by the political views that are being "articulated" but by the manner in which a revered symbol is being destroyed. Justice Brennan cavalierly dismissed the breach-of-the-peace concern by saying, "No reasonable onlooker would have regarded Johnson's desecration of the flag as an invitation to engage in fisticuffs." Apparently Justice Brennan thinks that patriotic Americans who would grab the flag to try to put out the flames are unreasonable people.

The interests that are posited by the government for having a law against flag-burning are well founded and do not run afoul of the

First Amendment. There are plenty of other ways that Johnson could have expressed his dissatisfaction. He could have burned the president in effigy, or Uncle Sam, or the Great Seal of the United States, or the Constitution. He could have desecrated anything but the one symbol that society considers sacred enough to save from destruction.

In conclusion, *Texas v. Johnson* was wrongly decided. I hope that the Supreme Court overturns its decision of last year. If the Court upholds its decision and strikes down the Texas law, the only way to correct the problem will be by constitutional amendment. Is that a good idea? I think so. Our Founding Fathers gave us a mechanism for amending the Constitution to suit the needs of the people. We have amended that document four times in response to Supreme Court decisions that the American people did not like. I would think that the proposed amendment would *add* to the Bill of Rights by giving the people the right to enact laws to protect their cherished national symbol. The First Amendment would be left intact. Protesters could engage in any other kind of symbolic speech they wished. A civilized society must be able to declare that certain things are sacred and to be protected from desecration, such as cemeteries, places of worship, and certainly our nation's flag, a revered and unique symbol.

Mr. Halperin: Paul is absolutely correct that the logic of my position compels me to say that penalties that are enhanced because the state does not like the content of what I spray on a synagogue are unconstitutional. The state cannot punish people for the content of their speech, whether they spray it on a building or put it in writing.

I am tempted to propose a constitutional amendment that says that people cannot express their political views while waving their hands in the air, as Paul does. I would then tell Paul that he was free to deliver exactly the same speech without waving his hands. Because I find it annoying to have people wave their hands in the air, the state should decide, if I could persuade enough of you, that political speech must be conducted without hand-waving. Everything Paul said about expressing views in other ways would be as true of hand-waving as it would be of flag-burning.

I did not say that it was the protester's belief that was being interfered with; it was the method of expressing that belief. The

First Amendment protects equally what I want to say and how I want to say it, unless the state has a compelling interest that is threatened by the form of my expression, which has nothing to do with the state's not liking the content.

Everything you have heard today should make it clear that the objection to the burning of the flag is precisely that Paul does not like, and the majority of American citizens do not like, the message that it sends. Burning the flag undercuts what they consider the unique symbol of the nation. And it is for that reason that flag-burning is different from desecrating graveyards that belong to other people. You could, in fact, build your own grave site and then desecrate it, and the government could not stop you. Indeed, I think freedom of religion is threatened by the logic of the Court's decision in *Texas v. Johnson*, as it is threatened by the decision in the peyote case, which is as fundamental a threat to the First Amendment as is a potential adverse flag-burning decision.

In short, my case begins and ends with the same point: the only interest the state has in banning flag-burning is that it does not like the symbolic content; it does not like the political message it conveys. Flag-burning is precisely the kind of conduct that the state *cannot* interfere with. It is not true, and I never said, that I can trump any state law about conduct by simply saying that I am doing it for political purposes—blaring my radio at 3:00 a.m., say, or walking nude down the street. The state can prohibit such conduct even if I say that it is the way I express my views, but *only* if the reason for its prohibition does not have to do with the content of my speech. In this case, it clearly does, and so the statute is unconstitutional and the amendment un-American.

Mr. Kamenar: It seems to me that if someone were to walk down the street nude as a political protest and pass out leaflets opposing the stuffy laws against nudity, Morton would have to call that action protected speech.

If someone is being prosecuted for the message he is trying to convey by burning the flag and the state does not prosecute someone else who is doing it with a different message, then one might have an equal protection argument—but not a First Amendment argument.

As for Morton's concern about the constitutionality of banning anything that you do not like if you can muster the support of

enough people, it seems to me that part of what our Founding Fathers provided in the Constitution was the majoritarian tenet that, yes, we need to protect the rights of dissenters, but at some point this is a society not just of individuals but of shared, common national values, and that we can express those values through laws passed by the majority—that's how a democracy works. There are hundreds of constitutional amendments that are thrown into the congressional hopper every year to make this or that unconstitutional, and they never get out of committee because there is no widespread support for them. I am not afraid that my position is going to open up a Pandora's box. If the Court strikes down the federal anti-flag-desecration statute, it is precisely the political process of amending the Constitution that will show what widespread support there is for protecting this symbol—not only by getting Congress to propose the amendment but by getting three-fourths of the states to ratify it. It seems to me that that kind of law is more representative of what the people believe than are all the other laws that are passed by a simple majority.

Resolved: The Civil Rights Act of 1990 Is a Threat to Our Civil Rights

Arguing Pro: *Richard A. Epstein*
University of Chicago

Arguing Con: *Antonio J. Califa*
American Civil Liberties Union

Introduction: *Roger Pilon*
Cato Institute

Roger Pilon: We debate today the proposition that the Civil Rights Act of 1990 is a threat to our civil rights. The 1990 act, known also as the Kennedy-Hawkins Bill, is presently under debate in Congress, where it was introduced earlier this year as an amendment to the Civil Rights Act of 1964. Proponents of the bill are responding to a series of employment discrimination decisions handed down by the Supreme Court during its 1988–89 term, which they say eviscerated important parts of the 1964 act as subsequently interpreted by the Court. Critics respond that the Court's recent decisions merely restore the original understanding of the 1964 act, whereas the 1990 bill, by shifting the burden to an employer to show that his employment practices do not discriminate for the proscribed reasons, will result in massive and costly litigation, in a de facto quota system for employment, or in the flight of businesses to less costly jurisdictions, including foreign jurisdictions.

All of which may lead us to troubling and, perhaps, unresolved questions about the 1964 act itself—whether it is possible effectively to prove discrimination without resort to some form of burden shifting and quotas, a question that the debate over the intent test and the effects test has left unresolved; or whether the legislative effort to end the very real problem of discrimination may not produce tensions and acrimony still worse than the wrongs sought to

be remedied in the first place, as is evidenced today, perhaps, on our nation's campuses; or, more abstract but no less important, whether we are clear about just what we mean by "civil rights." Are those the equal rights of all members of civil society—employers and employees alike? Or do we mean something narrower when we use that term?

The meaning of "civil rights" is especially important when we reflect on the older idea of freedom of association and all that it entails for good or ill. We understand the point when it comes to speech, when we distinguish between speech and its content, when we condemn the content while defending the right to speak. Is it any different with association? Does the failure to associate on unsavory grounds violate rights that unsavory speech does not violate?

Those questions and more are at issue here today. To debate them we are fortunate to have with us two distinguished experts on the subject. Arguing in the affirmative is Professor Richard A. Epstein, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. Professor Epstein has been the editor of the *Journal of Legal Studies* since 1981 and a member of the Academy of Arts and Sciences since 1985. His books include *Takings: Private Property and the Power of Eminent Domain*, *Cases and Materials on Torts*, and *Modern Products Liability Law*. He has taught courses in civil procedure, contracts, land development, property, torts, Roman law, and worker's compensation and has written extensively on those subjects as well as on constitutional and labor law. At present he is working on a book-length study of the anti-discrimination laws and employment. Before joining the University of Chicago faculty, Professor Epstein taught at the University of Southern California School of Law. He is a graduate of Columbia College, Oxford University, and the Yale Law School.

Arguing in the negative is Mr. Antonio J. Califa, legislative counsel for the Washington National office of the American Civil Liberties Union, where he has primary responsibility for the Civil Rights Act of 1990. For the past several years Mr. Califa has represented the ACLU as a lobbyist on a wide range of civil rights and civil liberties issues, including civil RICO, the Hatch Act, English-only, civil forfeiture, attorneys' fees, children's rights, disability rights,

the exclusionary rule, and judicial immunity. He has held several senior posts in the federal government with civil rights responsibilities, including deputy director for standards, policy, and research of the Office of Civil Rights at the Department of Health, Education, and Welfare and director for litigation, enforcement, and policy for the Office of Civil Rights at the Department of Education. Mr. Califa is a graduate of the University of Texas and, like Professor Epstein, of the Yale Law School.

Professor Epstein, why is the Civil Rights Act of 1990 a threat to our civil rights?

Richard A. Epstein: Roger, I don't know if you're asking the question or if in your introductory remarks you started to answer it. But in trying to deal with the general question, it's very important to understand that the current debate is one that essentially takes place within the beltway. One is concerned here with a series of decisions that have been handed down by the Supreme Court in recent years, and with the way in which they altered the status quo ante in civil rights enforcement during the period between, say, 1971 and 1988. And in dealing with the current situation, everybody is prepared to take advantage of the status quo when it suits him and to insist upon the high moral ground when the status quo runs in the other direction. So while the administration is quite content to say that the rules on back pay as they have existed since the inception of the 1964 Civil Rights Act are perfectly appropriate and ought not to be changed, the proponents of the new bill say exactly the same thing about preserving the disparate impact test under *Griggs v. Duke Power Co.* (1971).

Yet, if we really want to get to the heart of the 1990 Civil Rights Act, we have to abandon reliance on short-term assumptions, step back from the situation a little bit, and ask in a more general sense exactly what is going on, not only with the 1990 act but with the 1988 interpretation of the 1964 act or, for that matter, with any kind of civil rights act. To do that, however, we have to confront the question that Roger just raised, namely, which conception of "civil rights" are we going to embrace when we analyze any particular legislative program? And here it seems quite clear that the term "civil rights" had one very distinct meaning in the 1860s when the first civil rights acts were passed and a very different meaning when

we got to the 1960s and the second generation of civil rights acts. What we have to ask ourselves, then, is this: exactly what are the connections between these two very different conceptions?

The early civil rights acts were concerned essentially with the question of civil capacity, with whether black persons were entitled to enter into contracts, to make wills, to give evidence, to sue and be sued, to make leases, to purchase and hold real property, and so on. This original concern with civil capacity was perfectly general and universal in its implications. The early acts were designed to make sure that all persons could take their place in the network of common law relationships that constituted civilization and community. By owning property and being free to make contracts, they could participate in a market economy, choose their own associates, and otherwise enjoy and benefit from the gains of trade.

Now if someone were to sit back as a social theorist and ask whether the world is a better place with some people having civil capacities and others denied them, I don't think it would be difficult to conclude that the 19th-century legislative reform would be welcomed. Once you create a system of civil capacity, you open up the potential for gains from trade and the competitive market and you create a stable economic base that will ensure some degree of political stability. A conception of civil rights that declares that everybody is entitled to contract with whomever he pleases on whatever terms he pleases is one we should understand and welcome.

What happened to that conception of civil rights 100 years later? Well, the basic American political climate had changed greatly between 1860 and 1960, of course, because all forms of government regulation, which previously had been thought to be out-of-bounds, were by then regarded as appropriate. By the time we got to the 1964 act, most Americans believed that the National Labor Relations Act, mandatory collective bargaining, minimum wage regulations, and a variety of other restrictions on the ability to dispose of labor and capital in the market were entirely appropriate.

Now it seems to me that one important way in which to analyze each of those restrictions on voluntary transactions is to look at the level of welfare that all persons enjoyed in a world in which there was protection against aggression and the right to enter into various kinds of voluntary arrangements in order to see whether you can find an improvement if some of those first-order civil rights are

abridged by another order of civil rights, namely, the anti-discrimination rights embodied in the 1964 act, which makes it an unlawful employment practice to fail to hire, to refuse to hire, to discharge, or to otherwise discriminate against any individual because of his race, creed, religion, and so on. If you do that analysis, I think it gives a rather different cast to the Civil Rights Act of 1990. What the new bill assumes, in effect, is that the Civil Rights Act of 1964, as interpreted in the courts, has been a grand social success, while anything that cuts back on it is an inexcusable social failure. What we must have, therefore, is more of the same. If you get beyond the beltway, however, and ask what potential benefits you can identify from any form of civil rights act, I think you will find that the evidence is far more troublesome than reassuring.

Let me first try to put the case in the affirmative. Those people who defend the Civil Rights Act of 1964 and, by extension, the proposed 1990 act, have often tried to identify some improvement in the condition of certain protected classes—and here we'll stick to race to make things simple. It turns out that it is very difficult to get direct evidence on that particular point, so the measure that generally has been used is the white/black wage differential. If you have a differential between black and white earnings of 70 percent, for example, and the differential moves to 80 percent, that would be regarded as an improvement, whereas if the spread increased, that would be regarded as a move backwards. Now if you look at the history under the 1964 act, there is a clear narrowing of the spread between about 1964 and 1975. Most of the reduction of the spread, however, is concentrated in the southern states, which of course were subject to the direct and systematic forms of explicit segregation that went under the name of Jim Crow. But when you get to 1975 and trace the pattern out to the present time, these ratios show no significant shift or difference in any way, shape, or form. The numbers are essentially constant. There is no appreciable change either up or down. What you get is better attributable to random noise in a given year than to any systematic effect of the statute.

Now there is a certain irony about those results because the modern generation of civil rights enforcement began around 1971 with the *Griggs* case. After *Griggs* you start to see massive litigation under the disparate impact test articulated in that decision. But that

is precisely the time that you also see advances in black welfare, on the generally accepted measure, come to a clinking, grinding halt. That means that you have to come up with some kind of an explanation of why increased levels of civil rights enforcement led to a halt in civil rights advances, at least by the standard measure.

It turns out, however, that the situation is even more perilous and difficult than this, because the standard measures used by the proponents of the civil rights acts to assess black progress in the United States are, in fact, fatally flawed. The moment you start to talk about black/white differentials you soon realize that you could always improve the ratio by hurting white income while holding black income constant, so that the only gains you will get will be gains attributable to envy or something of that sort, rather than to any form of substantial economic progress. If black wages were 100 and white wages were 150, for example, you would improve the ratio if black wages went down to 90 and white wages went down to 110. There is no measure of aggregate output involved in the standard of relative wages. So we have a situation in which the standard itself does not tell us much.

We have to look elsewhere, then, to find the kinds of benefits associated with the statute that might justify its continued enforcement, much less expansion. And here, it seems to me that the only place we could look is to theory. Yet the theory on this particular point seems to go in the exact opposite direction. If you're trying to figure out what the logic of freedom of association is when you're dealing with contractual arrangements, essentially it starts on the premise that people more or less know what they are doing in this world and the only kinds of contracts they enter into voluntarily are those that are going to improve their lot. The great advantage of a system of contract is that it allows you to figure out that there has been some sort of social improvement without having to go inside the heads of individuals and decide exactly why they did what they did. What the modern civil rights acts do, however, is say in effect that the gains you would normally see with freedom of association really are not that important. We are so confident of our collective social judgment that we are going to force people to hire people they don't want to hire on the theory that the preferences they have are generally going to be irrational.

Those employers could be right or they could be wrong, of course. In a marketplace, however, in those cases in which the preferences

turn out to be irrational, there will be very powerful corrective mechanisms. Chief among those mechanisms are that the folks who engage in irrational consumption preferences will find that their own economic forces ebb, and they will have even less influence in the market; whereas the folks who hire the people that are left behind will be able to pick up the slack and prosper mightily. So if it turns out that there is irrational hiring, the social costs of that are going to be relatively low.

But now let us suppose it's the other way around, that the folks who decide not to engage in certain kinds of contracts have it right, because they are able to perceive something in their own private situation that no legislator or administrator is able to perceive when looking at the situation from a distance. Now, in effect, if you start to enforce the statutes, people will be forced to enter into bargains that by any objective economic standard will turn out to be generally irrational. And people, realizing that, will start trying to evade the statute, trying to run from it; they will flee the jurisdiction, go overseas, locate their plants in the suburbs, or do a thousand and one other things that will undercut the statute. All of those actions will essentially be wasteful. They are efforts to avoid regulation, not efforts to engage in any kind of productive activity.

When you look at the civil rights world, therefore, you see the following paradox. The individuals who are successful in maintaining various kinds of legal actions against defendants will, of course, be net winners. And when someone wants to defend the statute, he will point to those people and conclude that the statute has done well for its intended class. But all the indirect effects, which are not dramatic and not recorded in litigation, will in effect be unnoticed. You have a system that looks at litigation, records some of the social gains from the statute, but ignores systematically all of the affiliated social losses. If we want to know, therefore, why the figures are the way they are—general sluggish productivity, no movement within the black/white ratio, and so on—it is because the indirect effects, which are real and powerful, are systematically ignored while the litigation victories are trumpeted as evidence that something is right. We are told by supporters of the Kennedy-Hawkins Bill, for example, that we have a terrible situation because legal actions once allowed are now being dismissed. Yet unless you can figure out whether those actions, on balance, gave you a net social

gain, you cannot tell whether their dismissal is a good (thereby saving everybody litigation costs and uncertainty) or whether you now have some more generic and systematic social evil.

You have to keep your eye constantly on the larger picture, therefore. Yet not once, to my knowledge, have the modern civil rights statutes been given a powerful, theoretical justification of the sort that shows how their enforcement generates social benefits that exceed those provided by the cheaper system of the market, which can handle to a pretty good extent many of the irrational forces about which people complain. How did this situation come about? There was a fundamental mistake, I think, in our perception of what was wrong with the world before 1964, which has led to a lot of the confusion.

The basic question is whether we treat bad motive or powerful government as the source of the evils in the South (or in the North) with respect to the old Jim Crow. The modern view is to treat everything as a matter of bad motive.

I suggest that that is a mistake. What really matters is institutions. And it turns out that the great evil in the pre-1964 period was that virtually no forms of segregation were chosen by private contract—where the price would have been paid by the individuals who chose wrongly—but rather were imposed by government. There was thus essentially no freedom for people to opt out. Entry from outside the system was effectively foreclosed. That meant that the worst or most venal political majority was able to impose its will upon a minority, which would otherwise have been able to defeat the system of segregation through ordinary market efforts. What was needed in 1964, therefore, was a civil rights act whose major effect would have been to neutralize big government in the South—and, to some extent, in the North as well—an act that would not interfere, in effect, with ordinary market practices, which had not failed before 1964 because they basically had never been tried.

Now what happens when we move to today? Since we do not have a very strong conceptual framework as to why we want the 1964 statute, it becomes perfectly clear that we have no clear reason as to why we ought to expand it. But expand it is what we are doing. Essentially, the strategy of the civil rights statute is to make it absolutely impossible for anybody to engage in a voluntary action of any kind that would, in effect, expose him to potential liability

from any member of a protected group—minorities and women being the most important of those groups, but certainly not the only groups involved. So what the new statute does, in effect, is expand liability on all fronts. It takes all the old disparate treatment cases and essentially severs the requirement of proof of bad motive from any evidence or proof of the consequences that are said to flow from that motive. That means that you can attack the process of hiring at any stage. If any single component is defective, the entire process is defective.

Moreover, it is quite clear under the new act that you can have two groups successfully claiming to be the victims of discrimination, each by showing that one test hurts them relative to the other. By the time you are done with the analysis, you have a statute that enables a finding of discrimination against everyone and in favor of no one. That may be a logical impossibility, but it is perfectly possible under the act as it has been drafted. Again, by expanding liability and increasing the damages, and moving from back pay to compensatory and punitive damages, under mushy criteria, the expected value to you as an employer if you decide to go into the teeth of the new civil rights act is largely negative. Finally, with one-way cost shifting with respect to attorneys' fees and expert witnesses, it becomes essentially impossible to try to resist a claim under the civil rights statute because the cards are all stacked against you.

The rest of the story, then, is clear. Nothing in this statute even touches the issue of affirmative action. And by and large, I think, on consistent market grounds, if affirmative action is voluntarily adopted, no one should be able to say anything against it. But when you get the hammer on one side, and the carrot on the other, the odd effect of the Civil Rights Act of 1964 is this: because of its skewing effect, once amended, it will introduce far more institutional racism than would exist in a system of markets alone.

Now why would we want to do that? Roger alluded to the fact that there is a great tension in American law between the attitude we take toward speech, where racist and offensive speech turns out to be completely protected by the First Amendment, and the attitude we take toward economic liberties. In my view, that distinction simply cannot be maintained. The reason we are willing to suffer all sorts of indignities in the name of free speech is that we've learned the hard way that government monopolies over ideas or

any other aspect of human life will always lead to greater oppression than the momentary inconvenience we suffer when people utter abusive, thoughtless, or generally senseless kinds of things. The same thing is true here.

I have been with only two permanent employers in my entire life, and I still do not know how the University of Chicago, my present employer, runs from the inside. The thought that anybody from Washington can introduce major innovations that will alter the systems that we have in our universities and in countless other institutions strikes me as absolute hubris. It cannot possibly be sane or sensible to insist that central planning with respect to critical aspects of employment relationships should come out of Washington. There is a lesson to be learned from Eastern Europe, and it is a lesson to be learned from our own free speech tradition as well. If you want to have a healthy society, never concentrate power in anybody. The Civil Rights Act of 1964, in my view, was a mistake in the sense that it brought an enormous concentration of power into Washington. And the problem we have with the 1990 amendments is that they will put all sorts of daggers into the end of the club so that, in the end, the power that Washington will have over our lives and the lives of other individuals will be so great that the net effects will be felt both in the loss of liberty and in the loss of general economic productivity. It seems to me that you do not want to get yourself into a world in which you pay an enormous price in terms of litigation and dislocation in order to achieve an inferior set of social outcomes.

Antonio J. Califa: I should get extra time because I have to rebut both Roger's introduction and Professor Epstein's very rapid delivery. Oliver Wendell Holmes said that the life of the law is not logic, but experience. And I hope to add some experience to the logic that Professor Epstein has produced in his presentation. History and experience demonstrate that racism and sexism exist in our society. For three and a half decades, the Supreme Court was very clear about its opposition to racism and sexism. Last year the Court made an abrupt departure from that position. We expect that Congress will correct the mistake and pass the Civil Rights Act of 1990. And we believe that President Bush will sign the bill.

But the question before us today is, Does the 1990 Civil Rights Act threaten our civil rights? And, of course, it does not. It restores

civil rights, which the Court has taken away. It is the vital civil right to work free from discrimination that we are going to discuss.

In his speech and in his writings, Professor Epstein argues that the Civil Rights Act of 1964 is a threat and that we should rely on freedom of contract as a solution. Contract theory has been tried and rejected. The Epstein theory was quite fashionable in the 19th century. Until 1937 the Supreme Court largely rejected legislation aimed at regulating the economy because such legislation violated a property right that was a natural, God-given right. If that meant suffering for those people who lost in the free-market struggle, that was too bad.

Let us look at some of the underlying assumptions in the Epstein theory. His claims rest on the understanding that the employer and employee have an equal stake in the employment relationship and, therefore, have equal bargaining power. Now that may be true for University of Chicago law professors, but it is not true for the average person. Typically, an employer's livelihood is not dependent on a single worker, while the livelihood of a worker and her family may well depend on continued employment. Professor Epstein also believes that it is a simple matter for the employee to decide that when the costs of working become greater than the value of the paycheck, she will just stop working. Again, that is easier said for people in positions like Professor Epstein's than for people who live paycheck to paycheck, for whom the emotional and physical costs may have to be astronomical before they will stop working. In listening to the testimony before both the House and the Senate, it's incredible what some people put up with before they decide to leave their jobs—instances of racial and sexual harassment that continue for long periods of time.

It is very hard to dispute the argument that the market is more effective than the government in solving problems. And I will not attempt to do that. I believe that, to the extent possible, we should leave the market free to determine proper allocations of labor and capital. The efficiency of rational choices made free of discriminatory employment practices, however, may outweigh the costs of litigation and other governmental impositions. Where there is no discrimination in hiring, the applicant pool will be maximized, and from a larger pool, employers will be able to choose better employees. Professor Epstein overlooks history, empirical evidence, and the experience of working men and women in assuming

that freedom of contract will allow employees to maximize their opportunities. He has to concede the existence of prejudice.

Most people understand that prejudice exists in the marketplace. In a 1989 Lou Harris poll, the vast majority of Americans, 74 percent of whites and 79 percent of blacks, said they believed that most people are not hired and promoted mainly on how much they deserve and merit such advancement. Instead, other considerations often determine how people get hired and promoted. The market irrationality we are concerned with today is prejudice. And there is a vast body of scientific research that exposes the mechanisms by which invidious sexual, racial, and other stereotypes operate in employment. In *The Nature of Prejudice*, Gordon Allport observed that people use a "least effort" principle of organization. They group apparently similar people into categories. And people use discriminating cues, especially physical traits like race and sex, as ways of categorizing people and organizing information about them. Once people are categorized into groups, the possibility of discrimination arises. Research consistently demonstrates that when subjects are asked to evaluate their own group and another group and allocate rewards between the groups, out-group members are evaluated less favorably and given fewer rewards than in-group members, even when the subject or subject's group does not benefit from depriving or unfavorably evaluating the out-group. That means that the existence of prejudice is a powerful obstacle to the Epstein theory.

There is another invisible hand, along with Adam Smith's, that controls labor allocation. Even when there is no economic benefit, people will evaluate out-group members more harshly than they do members of their own group. Let me give you an example. Of a class of 88 candidates for partnership in a firm, the best client recruiter and highest money earner was not chosen for partnership. Although that person had brought between \$34 million and \$44 million worth of business to the firm, partnership was not offered, even though 50 offers of partnerships were made that year. The rejected associate was a woman, and the evaluating partners focused on her gender, not her accomplishments. To make partner, she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have your hair styled, and wear jewelry." In short, she was asked to conform to the stereotype that the evaluating partners had of a woman.

The deferral of partnership in the *Price Waterhouse v. Hopkins* (1989) case illustrates the irrationality of the market. The partners had everything to gain by making this highly productive woman a partner. Yet they rejected her purely on the basis of sex stereotyping, an irrational factor that should be impermissible and should not be sanctioned.

Professor Epstein's theory neglects that important phenomenon. Moreover, it is also incorrect as a matter of law to assert that making employment decisions on the basis of race or sex is a civil right. It most emphatically is not. The interest of an employee not to be harmed in his or her ability to make a living is superior to the interest of an employer to make employment decisions based upon such prohibited characteristics. And the Supreme Court was clear on that in *Hishon v. King & Spalding* (1984).

Finally, the Epstein theory is ahistorical. It does not take into account the expectations of the American people. Title VII has been part of the law for 26 years. People demand to be treated fairly. The Epstein theory would be a major mistake and a major step backward. We must reverse the Supreme Court's decisions in this area, because they halt progress toward equal opportunity. The Civil Rights Act of 1990 will continue our progress toward that very important goal.

The most discussed part of the bill is the provision that restores the *Griggs* standard. *Griggs* was written in 1971 by Chief Justice Burger for a unanimous Court. In the past 19 years, the *Griggs* decision has had an extraordinary impact on the American workplace. In literally hundreds of cases, federal courts have struck down unnecessary barriers to the full participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances. Those changes have opened up new jobs and careers to millions of Americans. In the decade after *Griggs*, to give one example, the number of black firefighters and black police officers in the United States doubled.

Employers have also benefited—and we have had lots of testimony from employers and attorneys representing employers saying that *Griggs* benefited them—because it prompted them to forsake reliance on unsubstantiated tests and other arbitrary job requirements that excluded large numbers of well-qualified individuals from employment or promotion. The attorney general of New

York, Robert Abrams, during his testimony before the Senate, said: "Because of the requirements imposed, the state devised a selection procedure that better served to identify those truly capable of performing their job and had less discriminatory effects on minorities."

In June of last year, in *Wards Cove Packing Co. v. Atonio* (1989), a five-member majority of the Supreme Court cut back drastically on the scope and effectiveness of *Griggs*. Let us examine the model laid out by the Burger Court in *Griggs*. It contained a careful balancing of the burden of proof. Once a plaintiff succeeded in establishing that an employment practice operated in a disproportionate fashion to exclude qualified members of a particular group, the burden was placed on the employer to demonstrate that the discriminatory practice was actually needed. That is not central planning. It is a simple allocation of who proves what. The understanding among courts as well as litigants before the courts was that the burden of "business necessity" and "business justification" was clearly on the employer—once the plaintiff had made the prima facie case. The Court in *Wards Cove* has thrown that balance so far out of kilter that the decision undermines the effectiveness of the *Griggs* rule. It does so by erecting evidentiary hurdles that would make it monumentally harder for plaintiffs to prove their cases. Eighteen years of precedent were abruptly overturned by the Supreme Court with the *Wards Cove* decision.

Now, what does the Civil Rights Act of 1990 do? Simply, it changes the evidentiary balance that existed before *Wards Cove* by making it once again feasible for plaintiffs to challenge discriminatory selection devices and systems. The bill does that in three ways. First, it provides that the burden of persuasion, as well as production, shift to the employer, who must persuade the court of the business necessity behind a particular practice that has been shown to operate in a discriminatory fashion. Second, it restores the high level of exculpatory justification under which the discriminatory practice must bear "a demonstrable and substantial relationship to effective job performance." Finally, it makes clear that a group of employment practices can be challenged on the basis of their cumulative impact. That is a sound, fair, and balanced policy that should be reinstated.

Let me address briefly the question of quotas. People have expressed concern that this bill is a quota bill. In this case, the Civil

Rights Act of 1990, that concern is totally unfounded. Even former solicitor general Charles Fried stated in his testimony that under *Griggs* there was no general movement toward quotas. There is no evidence that the *Griggs* rule coerced or compelled any employer to adopt hiring or promotion quotas. The 1990 act will not compel employers to adopt quotas in hiring or promotion either. It will not permit across-the-board challenges to hiring or promotion processes when there is statistical disparity. To make out a cause, a complaining party will have to show that an employment practice or group of practices has a disparate impact on qualified women or minorities. As former secretary of transportation William T. Coleman, Jr., testified, practical experience demonstrates that plaintiffs frequently have considerable difficulty establishing a prima facie case. There are, in fact, several hundred disparate-impact cases that civil rights plaintiffs lost because they were unable to meet the stringent requirements for establishing a prima facie case. So the quota argument is not persuasive.

In conclusion, the Civil Rights Act of 1990 will return the law against employment discrimination to its pre-*Wards Cove* status. The costs that Professor Epstein's theory of employment relations will bring us are too high. It is morally wrong to condone discrimination on the bases of race, sex, national origin, or religion, and that is one thing that Professor Epstein has not addressed. The Civil Rights Act of 1990 will restore an important civil liberty, the right to work free from discrimination.

Prof. Epstein: In making his remarks about the power of prejudice, Mr. Califa did not respond to what I said about the prospects for success of irrational conduct in the marketplace. The source of his error lies in his failure to confront a distinction so central to modern economic theory, namely, that between the average and the marginal actor.

In trying to figure out how a market works, it is important to keep that distinction in mind. Thus if you could prove quite convincingly that a huge portion of the population is prejudiced, you could say that the average person in a particular market is prejudiced. But when you are dealing with hiring decisions, each particular employee is going to search as best he can to find that employer who is least hostile to his particular situation. So in trying to make

a judgment as to the prejudice of the market, you do not look at the average employer but at the marginal one. It turns out, therefore, that under those circumstances you can have 90 percent of the market dead-set against hiring you for any particular reason and still get a wage equal to that of anybody else by virtue of exploiting those opportunities that exist in the other 10 percent. Only if we start to talk about "The Worker" and "The Employer" as though each of them is a monolith with no other opportunities does the situation seem to be implausible.

Now what has happened, essentially, is that Mr. Califa has made the market look like a replica of the legislative situation. There is one employer and there is one employee, locked in deadly combat, and the question of inequality of bargaining power amounts to deciding who gets the lion's share of the gains from trade. That, however, is just the wrong model.

Second, it's nice to see that the theory in support of the anti-discrimination statutes rests upon the most insecure intellectual foundation possible, the argument of inequality of bargaining power in the marketplace. In the ordinary competitive market, essentially no one will enter into a transaction unless he thinks he will be made better off by it. That will be true independent of social circumstances, including prior endowments of wealth. The only time that inequality of bargaining power becomes an issue is when there are some monopoly rents to be distributed between the two parties and someone, by virtue of a stronger threat position, will be able to extract a larger share of that particular surplus than his trading partner. Ironically, if the Civil Rights Act of 1990 is enacted, that kind of situation will be created. People do not quit jobs today, in part, because it is much more difficult to get hired in a market in which there are tax disincentives, minimum wage requirements, OSHA requirements, workman's compensation requirements, anti-discrimination requirements, and so forth, which means that once you hire somebody it is likely to be for a very long period of time, perhaps even for life.

Once again, then, we have to keep things clear: the absence of mobility in the market cannot be treated as something that is wrong with my theory or with the theory of the market. All the legislative obstacles to shifting employment are created by the theory Mr. Califa likes. Yet he turns around and says that there is much less

mobility than he would want in a market. If we are serious about expanding mobility, therefore, we will have to do more than chase after the civil rights acts. We will have to go after the minimum wage law and a variety of other statutes as well, all of which restrict various kinds of labor mobility.

A third question with the modern civil rights acts is whether we ought to force people to be free. In his discussion of the *Griggs* doctrine, Mr. Califa noted that there were many employers who were relieved and were willing to testify before Congress about how the requirements of the statute emancipated them and made them wiser and more sane employers than they had been before. I am prepared to believe that in the adroit political environment in which Mr. Califa works, you can find, out of an array of a million employers, somebody to say anything; but I would also urge that one thing legislation never conforms to, particularly in its testimonial phase, is the principle of random sampling with respect to the local environment. It is just incredible to think that these kinds of self-serving apologies and political statements, strategically made, should be treated as having any kind of scientific validity whatsoever.

Now there are a number of surveys, some even done by the government, that look rather different. One of the things *Griggs* said was that employment tests are worthless unless they are "job related." Well, the Departments of Labor and Justice ran a joint study and, lo and behold, when they looked at an institution known as validity generalization, it turned out that the factual predicate on which *Griggs* was based was just a bald-faced error. A completely irresponsible, totally foolish, utterly indefensible assumption that unless the test was job related it was worthless. Every single study suggests that there is an enormous ability to take tests in one area for one kind of job and those tests will have fairly powerful predictabilities in other areas and for other kinds of jobs. The positive correlation coefficient of test and productivity is around 0.50. There is nothing else in the business world available that is close to that. The standard tests that were knocked out by *Griggs* were, in fact, of enormous importance because they reduced the reliance on the kinds of invidious stereotypes that Mr. Califa deplors, such as race, sex, and so on. What happens, then, is we are told that those things are valid in the scientific sphere, but then when we come

into another sphere, the political arena, all of a sudden the tests are worthless. Yet if it turns out in fact that they are worthless, firms will abandon them voluntarily; they do not have to be kicked to do so. In fact, some firms will specialize in beating the tests, hiring people who test poorly but perform well. There is nothing in a market that requires every firm to adopt a single homogeneous strategy.

That brings me to a final question: is this statute a form of central planning? Well of course it has got to be a form of central planning because there are now some very key elements of the employment contract that everybody has to follow, whether he wants to or not. Everybody has to hire in accordance with the rules that Mr. Califa likes, which I find in most places to be enormously cumbersome. But where is the gain? It is perfectly permissible to point to some firefighters who win: every statute has its winners, otherwise it would not get passed. But if you are looking for aggregate data, the numbers there are as negative as on a flat electrocardiogram. The patient is dead. From an ex ante perspective, there is absolutely no aggregate evidence that anybody is benefiting. What we can say is this: If you are black and if you are a woman, the statute will probably help you if you are reasonably well-to-do, because what it does is induce employers to cream the market, to take those employees at the lowest risk, because they know, once hired, those people cannot be fired. If, on the other hand, you care about the dispossessed and the lower strata within any particular racial or sexual group, then the last thing you want is a civil rights act of the modern variety. The empirical studies suggest—weakly, to be sure, but nonetheless suggest—that the key variable is not the average wage rate of blacks to whites but the increase in variance within the class. And you will increase that variance, which will mean that basically the civil rights litigation or statute is nothing other than the usual business in Washington, which is that the rich get richer and the poor get poorer by virtue of a system of legislation. One ought to understand the statute in exactly that way.

The fact that somebody comes up and says that we are only restoring a previous balance is not an argument. It is wrong for two reasons. First, it is a balance that should not be restored; the old law itself was absolutely oppressive, and whatever the Court's decisions in 1989, they improved it only moderately. Second, it is

not a restoration. The most important provision of the statute is one that Mr. Califa did not mention. That provision changes the damages for breach. If you are going to take a case that used to be a back-pay case for \$50,000 and turn it into a wrongful-dismissal case for a million dollars, you have completely transformed the civil rights statute. So when you hear about restoration, I think the best thing to do is to put your hand on your wallet.

Mr. Califa: Let me try to deal with a few of the points that Professor Epstein has raised. A fair evaluation of the overall impact of equal employment opportunity laws shows that there is a net benefit. They have not reduced the rates of black and white unemployment, but they have reduced the disparity between black and white median incomes. They have had some success for black males and major success for black females. Insofar as they were designed to reduce the concentration of blacks in unskilled and semiskilled jobs, they have had some success. Insofar as they were designed to reduce the near exclusion of blacks and other minorities and women from higher status jobs, they have been a spectacular success. Nicholas Katzenbach, in his testimony before the Senate, said that before the Civil Rights Act of 1964, IBM, of which he was general counsel for a long period of time, had 750 black employees. By 1980 it had 16,546. The number of minority and female officials in management grew from 429 blacks to 1,600, without the use of quotas. And he also commented on some public-sector advances. He very clearly and decisively put his finger on one of the problems of public-sector employment, namely, that before the 1964 act there were very few black and Hispanic firefighters and policemen, even in cities that were predominantly minority, like Birmingham, Alabama.

One of the things the 1964 act has been very successful in combating is arbitrary standards, such as height and weight restrictions, that have kept women and certain minorities out of public-sector employment. According to testimony in *Dothard v. Rawlinson* (1977), height and weight restrictions made it impossible for more than half the women in Ohio to be corrections officers. Only 1 percent of the males were so affected. In New York, an Asian-American policeman could not meet the 5'7" minimum height requirement. When he was told it was important to be 5'7" to defend himself, he

tried to show that he was knowledgeable in kung fu and karate. When told that that was not enough, he challenged the standards and won. He and about 180 other Asian-Americans have now become police officers in New York City because of the elimination of that irrational height requirement.

I want to comment also on the economic analysis that Professor Epstein has used. It is very misleading to say that an individual has equal bargaining power with an employer. The fairest reading of the 19th-century law that Professor Epstein is so enamored of is that it places great state power in private hands, and in so-called freedom of contract. As Max Weber commented, that phrase is very misleading. The employer has all the freedom, the employee has none. An individual is not free from domination by others. The essential feature of freedom of contract is not that persons are left unregulated to make agreements as they please but that their agreements will be enforced by the state in favor of the person or entity with concentrated economic power.

Let me finish with this comment. In the months that we have spent on the Hill listening to people talk about the 1990 Civil Rights Act, we have not heard from one employer who said that the 1964 Civil Rights Act caused him to resort to quotas. And to say that I work in an adroit political environment and that I've selectively found those facts is incorrect and misleading. There simply is no case to be made on quotas. Finally, the 1964 Civil Rights Act is something that a lot of people worked hard for. I think it has been a great success in a legal sense and in an economic sense. We should not abandon it unless there is clear and convincing evidence to the contrary, and I submit to you that Professor Epstein has not shown, entertaining as he has been today, that the Civil Rights Act of 1990 will take away anybody's civil rights.